

# Smith Canal Gate Project: Proposed Determination Regarding Appeal of Certification of Consistency

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# Overview

- Council's covered action authority and process
- Summary of Staff Report and Proposed Determination Regarding Appeal of Certification of Consistency (Proposed Determination)
- Staff analysis and recommendation
  - *Staff recommends that the Council adopt the Proposed Determination, which contains findings denying the appeal*

# Covered Actions

- 2009 Delta Reform Act
  - State of California's policy to achieve the coequal goals
  - Granted Council regulatory and appellate authority over covered actions
- Delta Plan
  - Regulatory policies to meet objectives the Legislature said were inherent in the coequal goals
- Covered Action Authority
  - State and local agencies must demonstrate consistency with Delta Plan policies when carrying out, approving, or funding covered actions, prior to implementation

# Certifications and Appeals

- Certification of Consistency (Certification)
  - Proponent determines if a project is a covered action and submits certification to the Council
  - Council publicly notices receipt of certification
  - Covered actions require written certification with detailed findings
- Appeals
  - Any person who claims a covered action is inconsistent with the Delta Plan may file an appeal within 30 days
  - Appeal must include specific factual allegations
- Certifications and appeals are noticed and listed on Council website

# Hearings and Determination

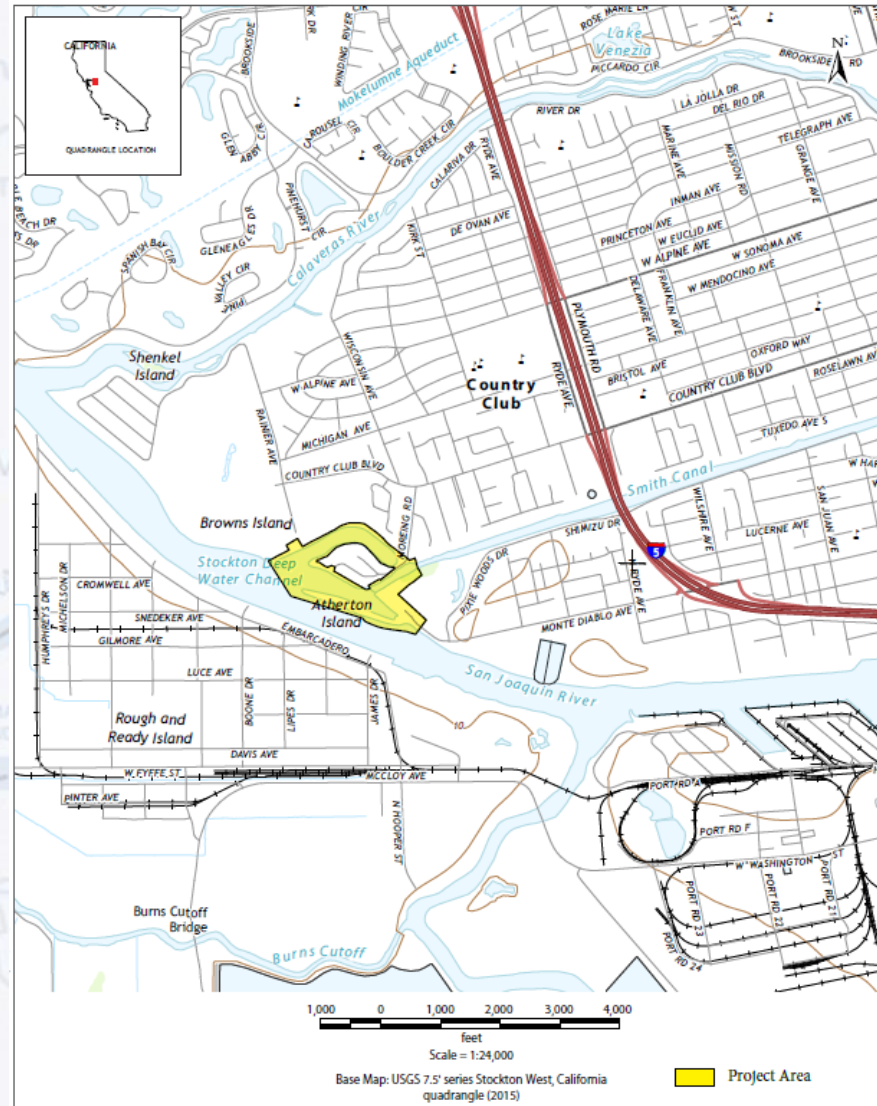
- Council must conduct a hearing on appeals within 60 days of filing
- Council must make a decision regarding appeals within 60 days of the hearing
- Determination options (Water Code section 85225.25)
  - *Deny appeal* - project may proceed
  - *Remand the project* to proponent for reconsideration

# Substantial Evidence Standard

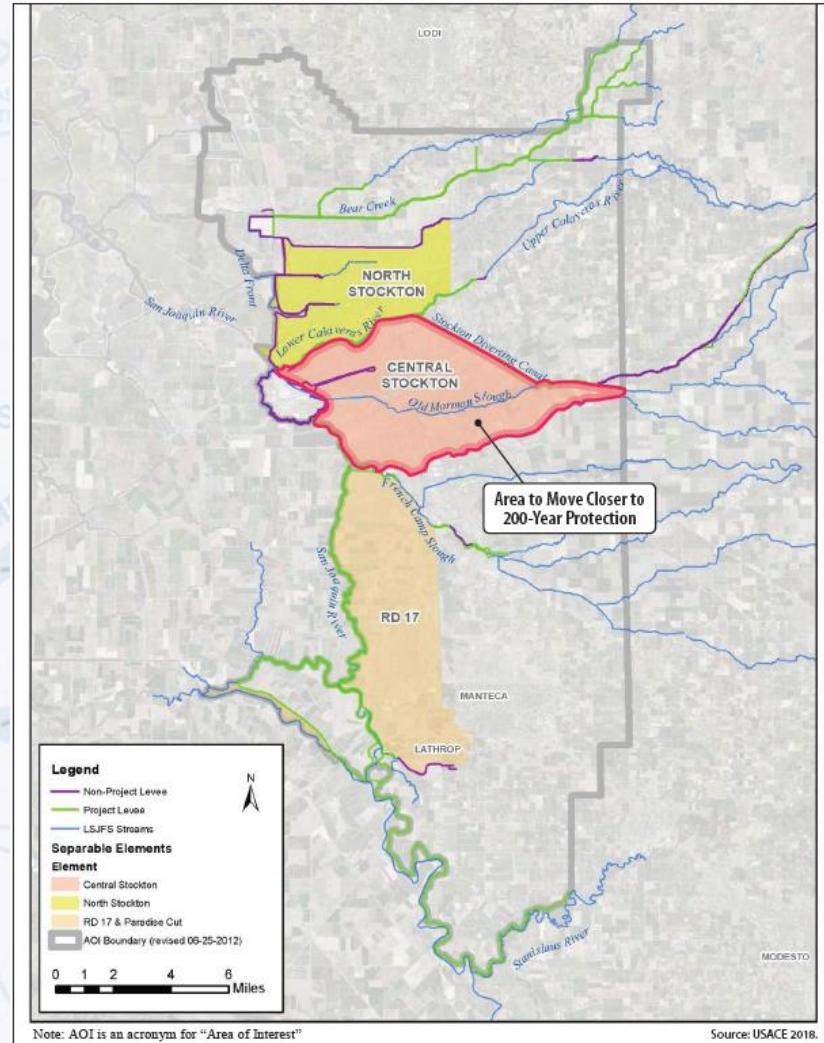
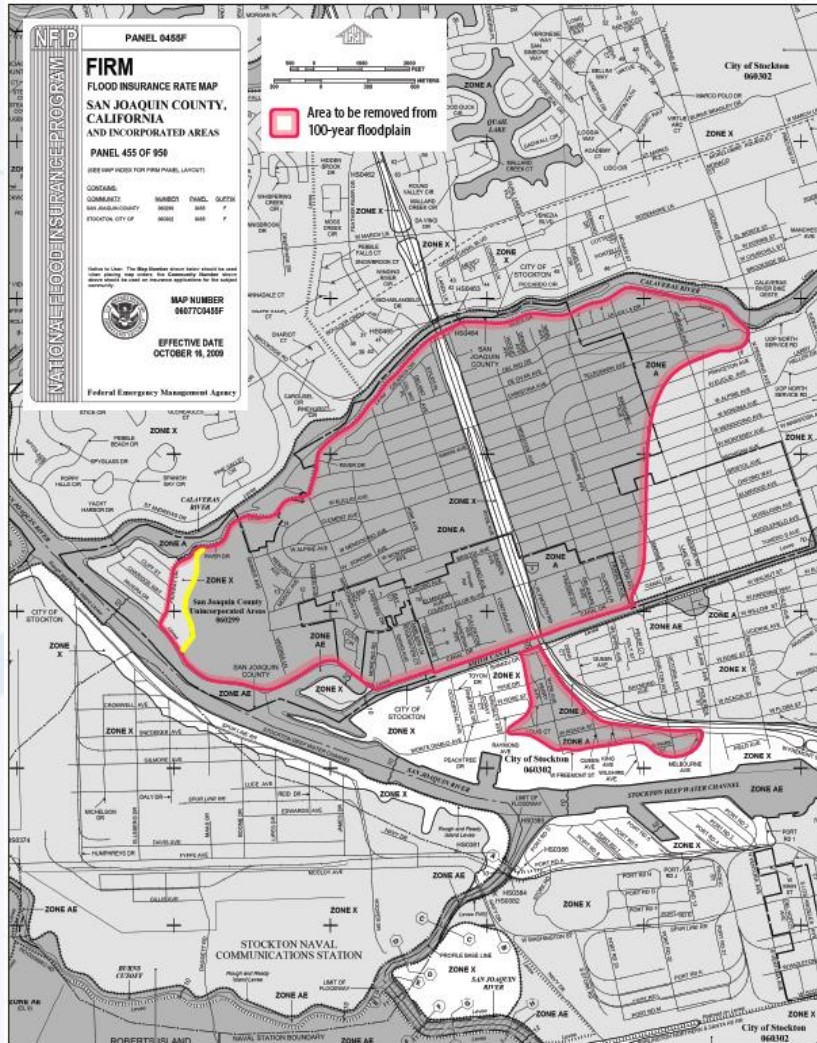
- Scope of Council's review is whether the Certification is supported by substantial evidence in the record
  - Council does not independently review the project to determine if it is consistent with Delta Plan
- Substantial evidence is:
  - Facts
  - Reasonable assumptions based upon facts
  - Expert opinion supported by facts

# Project Description

- Project proponent
  - San Joaquin Area Flood Control Agency (SJAFC)
- Fixed wall and gate structure at mouth of Smith Canal and Atherton Cove in Stockton
- According to SJAFC, project is necessary for flood protection
- Certification of consistency available on Council's website



# Project Description



# Project Description



# SJAFCA's Certification

Delta Plan Policy	Policy Title	SJAFCA's Finding
G P1 (b)(2)	Detailed Findings to Establish Consistency with the Delta Plan (Mitigation Measures)	Consistent
G P1 (b)(3)	Detailed Findings to Establish Consistency with the Delta Plan (Best Available Science)	Consistent
G P1 (b)(4)	Detailed Findings to Establish Consistency with the Delta Plan (Adaptive Management)	N/A
WR P1	Reduce Reliance on the Delta through Improved Regional Water Self-Reliance	N/A
WR P2	Transparency in Water Contracting	N/A
ER P1	Delta Flow Objectives	N/A
ER P2	Restore Habitats at Appropriate Elevations	N/A
ER P3	Protect Opportunities to Restore Habitat	N/A
ER P4	Expand Floodplains and Riparian Habitats in Levee Projects	N/A
ER P5	Avoid Introductions of and Habitat Improvements for Invasive Nonnative Species	Consistent
DP P1	Locate New Urban Development Wisely	N/A
DP P2	Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats	Consistent
RR P1	Prioritization of State Investments in Delta Levees and Risk Reduction	Consistent
RR P2	Require Flood Protection for Residential Development in Rural Areas	N/A
RR P3	Protect Floodways	N/A
RR P4	Floodplain Protection	N/A

# Appeal Description

- Appellant
  - Atherton Cove Property Owners Association (ACPOA)
- Appeal contends SJAFCA failed to demonstrate substantial evidence within the record to support consistency with aspects of:
  - Policy **G P(1)(b)(2)** – Mitigation Measures
  - Policy **G P(1)(b)(3)** – Best Available Science
  - Policy **G P(1)(b)(4)** – Adaptive Management
  - Policy **ER P5** – Invasive Nonnative Species
- Appeal available on Council's covered action website

# Smith Canal Appeal Timeline

- **November 2, 2018** – Council received Certification of Consistency for the Smith Canal Gate Project from SJAFCA
- **December 3, 2018** – Appeal filed by ACPOA
- **December 13, 2018** – SJAFCA certified record as full and complete
- **January 24, 2019** – Council held a hearing on the appeal
- **February 21, 2019** – Council provided notice of today's hearing and released Staff-Prepared Draft Determination for public review
- **February 28, 2019** – Council received comments on Staff-Prepared Draft Determination from parties and interested persons
- **March 14, 2019** – Council released Proposed Determination for review and discussion at today's hearing

# Proposed Determination

- Proposed Determination released March 14, 2019
  - Includes revisions addressing comments received on Staff-Prepared Draft Determination
  - Recommends the following findings based on staff analysis:

Delta Plan Policy	Did Appellant demonstrate lack of substantial evidence in record to support SJAFCA's Certification?
G P1 (b)(4) Detailed Findings - Adaptive Management	No, policy does not apply
G P1 (b)(2) Detailed Findings - Mitigation Measures	No
GP1 (b)(3) Detailed Findings - Best Available Science	
ER P5 Avoid Introductions of and Habitat Improvements for Invasive Nonnative Species	

# Policy GP 1(b)(4):

## Detailed Findings – Adaptive Management

- Appeal Issue
  - Appellant contends that because the Project would alter water flows, hydrology, invasive species, or other factors affecting aquatic habitat in the Delta, it falls within the definition of a *water management* project
  - A *water management* project must prepare an adaptive management plan to comply with G P1(b)(4)
- Staff Analysis
  - Based on review of Delta Reform Act and Delta Plan regulations, *flood control projects* are a separate project category from *water management projects*
  - Policy GP 1(b)(4) does not apply to flood control projects
- **Conclusion:** *Council need not consider applicability of GP 1(b)(4) to Smith Canal Gate Project*

# Policy GP 1(b)(2):

## Detailed Findings – Mitigation Measures

- Policy G P1(b)(2) requires covered actions (that are subject to CEQA) to include *applicable* mitigation measures from the Delta Plan PEIR or substitute equivalent measures
- Where the facts show that significant environmental impacts will not occur, Delta Plan measures are not applicable
- Appeal Issue – Delta Plan Mitigation Measure 4-1
  - Delta Plan Mitigation Measure 4-1 requires an invasive species management plan for projects that could introduce or facilitate invasive species establishment
  - SJAFCA proposes a water hyacinth control program as part of the Project
  - Appellant contends the water hyacinth control program is not equally or more effective than Delta Plan Mitigation Measure 4-1
- Staff Analysis
  - Delta Plan Mitigation Measure 4-1 does not apply to water hyacinth impacts of the Project because the FEIR did not identify potentially significant impacts
- **Conclusion:** *Appellant fails to show that there is not substantial evidence to support SJAFCA's Certification*

# Policy GP 1(b)(2):

## Detailed Findings – Mitigation Measures

- Appeal Issue – Delta Plan Mitigation Measures 4-2, 4-3
  - Appellant contends that SJAFCFA fails to avoid or mitigate operational impacts to special status fish species from increased predation, as required by Delta Plan Mitigation Measure 4-2
  - Appellant contends that SJAFCFA fails to avoid or mitigate operational impacts to fish habitat, as required by Delta Plan Mitigation Measure 4-3
- Staff Analysis
  - Delta Plan Mitigation Measure 4-2 does not apply to the Project because the FEIR does not identify potentially significant operational impacts to special-status fish species
  - Delta Plan Mitigation Measure 4-3 does not apply to the Project because the FEIR does not identify potentially significant operational impacts to fish habitat
- **Conclusion:** *Appellant fails to show that there is not substantial evidence to support SJAFCFA's Certification*

# Policy GP 1(b)(3):

## Detailed Findings – Best Available Science (BAS)

- Appeal Issues

- Appellant contends that SJAFCA failed to demonstrate compliance with G P1(b)(3)'s BAS criteria of Relevance and Inclusiveness for two issues:
  - Appellant contends that SJAFCA improperly relies on residence time to analyze water quality impacts
  - Appellant contends that SJAFCA fails to analyze cyanobacteria proliferation

- Staff Analysis

- Appellant fails to explain how SJAFCA does not meet BAS criteria
  - Residence time – Appellant does not explain why limitations of hydrodynamic modeling make the analysis inconsistent with the Relevance and Inclusiveness criteria for BAS
  - Cyanobacteria – Appellant does not explain how arguments provided in the Appeal demonstrate that SJAFCA fails to meet BAS criteria
- **Conclusion:** *Appellant fails to show that there is not substantial evidence to support SJAFCA's Certification*

## Policy ER P5:

# Avoid Introductions of and Habitat Improvements for Nonnative Invasive Species

- Appeal Issues
  - Appellant contends that SJAFCA does not fully consider and avoid or mitigate the potential for new introductions of, or improved habitat conditions for, water hyacinth and invasive predatory fish species
- Staff Analysis
  - Appellant fails to demonstrate that SJAFCA does not fully consider and avoid improved habitat conditions for water hyacinth in the Project
    - The project includes a water hyacinth control program
  - Appellant fails to demonstrate that SJAFCA does not fully consider the potential for the Project to increase habitat for invasive fish
    - Project design changes and potential effects of altered flows are included in the analysis of predation impacts to special status species
- **Conclusion:** *Appellant fails to show that there is not substantial evidence to support SJAFCA's Certification*

# Proposed Determination Conclusion

- Appellant fails to show there is not substantial evidence in the record to support SJAFCA's Certification with respect to :
  - Policy **G P(1)(b)(2)** – Detailed Findings: Mitigation Measures
  - Policy **G P(1)(b)(3)** – Detailed Findings: Best Available Science
  - Policy **ER P5** – Nonnative Invasive Species
- Policy **G P1(b)(4)** – Detailed Findings: Adaptive Management does not apply to the Project

## Staff Recommendation

- Staff recommends that the Council *deny the appeal*, pursuant to Water Code section 85225.25

A detailed map of the Sacramento-San Joaquin River Delta. The map shows the Sacramento River flowing from the north and the San Joaquin River flowing from the east, meeting at the Delta. Numerous islands and tracts are labeled, including Grizzly Island, Wheeler Island, Honker Bay, Sherman Island, and many others. Major infrastructure like the North Bay Aqueduct, Barker Slough Pumping Plant, and Mokelumne Canal are also shown. The city of Rio Vista is marked with a dot. The map is rendered in a light blue and grey color scheme.

# Questions and Discussion